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**IN THE DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

AE JA ELLIOT PARK,

Plaintiff,

VS.

JARROD MANGLOÑA, et al.,

Defendants.

Civ. No. 07-0021

OPPOSITION TO MOTION FOR ATTORNEYS' FEES

Date: April 10, 2008
Time: 8:30 am

Plaintiff Ae Ja Elliot Park opposes Defendants' Motion For Attorney's Fees on the following grounds:

1. The motion is premature. 42 U.S.C. § 1988 provides only for an award of fees to a “prevailing party.” Defendants have not prevailed as to the due process claim in the Second Amended Complaint (the only claim as to which they seek fees), and it is an open question whether they ever will prevail, since their motion to dismiss that claim has not yet even been heard, let alone ruled on.

2. Even if the motion were timely, and even if Defendants’ motion to dismiss the due process claim is ultimately granted, fees should still be denied. As Defendants themselves admit, fees are available to a prevailing defendant in a civil rights action only in the event the plaintiff’s claim was “unreasonable, frivolous, meritless, or vexatious.” See Motion for Attorney’ Fees at 2 (quoting Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994)). It was not

1 unreasonable or frivolous for Plaintiff to reassert her due process claim in her Second Amended
2 Complaint. On the contrary, it was necessary to do so in order to preserve her appellate rights with
3 respect to that claim, because the due process claim in her First Amended Complaint was dismissed
4 *without prejudice*. See Order Granting Defendants' Motion To Dismiss (November 16, 2007) at 8
5 ("Accordingly, the motion is GRANTED without prejudice as to the first and second causes of
6 action."); *id.* at 9 ("Accordingly, the motion to dismiss is granted without prejudice."). A dismissal
7 without prejudice is not a final or appealable order. WMX Technologies, Inc. v. Miller, 104 F.3d
8 1133, 1136 (9th Cir. 1997) ("We now specifically rule that a plaintiff, who has been given leave to
9 amend, may not file a notice of appeal simply because he does not choose to file an amended
10 complaint. A further district court determination must be obtained."). Thus, Plaintiff would not
11 have acted unreasonably or frivolously even if she had reasserted her original due process claim
12 verbatim.

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14 3. In any event, she did not repeat that claim verbatim. On the contrary, she modified it,
15 most significantly by enumerating other laws and regulations of the CNMI, in addition to the
16 Victims' Bill of Rights, which create the liberty and/or property interest of which she was deprived.
17 See generally Second Amended Complaint at ¶ 82. Defendants' "law of the case" argument thus
18 defeats itself. If Plaintiff had merely reiterated the same claim that she had made previously, and
19 that the Court had already ruled on, Defendants would not have needed to spend any attorney time
20 in arguing against it. They could simply have moved to re-dismiss it with a single sentence, along
21 the lines of the following:

22 Since Plaintiff's due process claim is the same claim already dismissed by the Court
23 in its previous order, it should be dismissed again, this time *with* prejudice, on the
basis of the Court's reasoning in that order.

24 Defendants correctly recognized, however, that the due process claim in the Second Amended
25 Complaint actually does raise issues that were not raised in the First Amended Complaint or on the
26 motion to dismiss it. See Motion to Dismiss at 12 ("Ms. Park, however, didn't stop at the CNMI
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1 Victims' Bill of Rights.")). Accordingly, Defendants' motion to dismiss, insofar as it addresses the
2 due process claim, is principally devoted to arguing against the new issues raised in the Second
3 Amended Complaint. See id. at 12-14. Since these new issues were not raised in the First Amended
4 Complaint, the court has never ruled on them, and they therefore cannot be contrary to the "law of
5 the case."

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7 The motion for fees should therefore be denied in its entirety. Even if it is granted, however,
8 the full amount sought (\$2000) should not be awarded. Mr. Huesman ascribes that amount to his
9 work done on the Motion to Dismiss as a whole, but even he claims that only the due process claim
10 is frivolous, not the whole complaint. If any fees are to be awarded at all, therefore, it should be
11 only for the work done with respect to that claim.¹

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13 Respectfully submitted this 15th day of March, 2008.

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15 O'CONNOR BERMAN DOTTS & BANES
16 Attorneys for Plaintiff

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18 By: _____/s/_____
19 Joseph E. Horey

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21 3268-01-080312-PL-M attorney fees-OPP.wpd
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27 Mr. Huesman does not specify how many of his 20 hours relate to the due process issue, but
28 it does not appear to be very many, since the discussion of due process occupies less than four full
pages of his 18-page brief (pp. 10-14), and most of that (p. 12-14) relates to the new issues raised
in the Second Amended Complaint.

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